



State of Tennessee
Department of State
Administrative Procedures Division
312 Rosa L. Parks Avenue
8th Floor, William R. Snodgrass Tower
Nashville, Tennessee 37243-1102
Phone: (615) 741-7008/Fax: (615) 741-4472

July 29, 2010

Marcella Derryberry, Esq.
1139 Battery Lane
Nashville, TN 37220

Valerie Speakman, Esq.
160 South Hollywood
Memphis, TN 38112

RE: In the Matter of: J.C.W. vs Shelby Co. Schools Docket No. 07.03-105006J

Enclosed is an Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/abh
Enclosure

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF:

**J.C., by and through
M.W. and K.W., his Parents,
Petitioners,**

vs.

**Shelby County Schools,
Respondent.**

DOCKET NO: 07.03-105006J

FINAL ORDER

This matter was heard on May 25, 26, 27 and 28, 2010 before Joyce Carter-Ball, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division pursuant to T.C.A. §49-10-606 and Rule 520-1-9-.18. Valerie B. Speakman, General Counsel, Shelby County Schools, (hereinafter referred to as "SCS") represented the Respondent. Petitioners were represented by their legal counsel, Marcella G. Derryberry.

The subject of this proceeding is whether SCS provided a free, appropriate, public education ("FAPE") to the Petitioner (hereinafter referred to as "J.C."); whether SCS violated the IDEA; whether SCS complied with the procedures of the Act; whether J.C.'s IEPs were reasonably calculated to enable him to receive some educational benefit; whether Discovery Ranch is an appropriate placement for J.C.; and whether Petitioners are entitled to the relief sought or to any relief.

After consideration of the entire record, testimony of witnesses, and the arguments of the parties, it is DETERMINED that Respondent SCS **provided** J.C. with a free, appropriate, public education; SCS did not violate the IDEA; SCS complied with the procedures of the Act; J.C.'s

IEPs were reasonably calculated to enable him to receive some educational benefit; Discovery Ranch is not an appropriate placement for J.C.; Petitioners are not entitled to the relief sought or to any relief; and, Shelby County Schools is the prevailing party in this matter.

This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. J.C. is a 16 year old student currently enrolled at the Discovery Ranch in Utah. J.C. is an intelligent young man, with an I.Q. of 113. J.C. was diagnosed with Asperger's Syndrome in the summer of the 5th grade.
2. Asperger's Syndrome is a medical condition which cannot be cured, and there is no specific answer for some of the social problems that exist with persons who have Asperger's. Their language ability and intelligence are in the normal range, but they can sometimes have rigidity in thinking.
3. J.C. attended SCS from 3rd grade through the first month of his 10th grade year. J.C. has behavior problems that have been addressed by the school system and Shelby County since the 3rd grade.
4. At the September 27, 2005 IEP team meeting Mary Coleman, the SCS behaviorist and member of SCS's student response team assigned to work with J.C., noted that J.C. was lacking in social skills and suggested that he attend SCS's STEP program, but the team did not act on Ms. Coleman's suggestion. Mary Coleman has an undergraduate degree in Special Education and has 35 hours toward her Master's degree in Special Education. Ms. Coleman has worked in the special education field for 37 years.
5. On November 7, 2005, the IEP team again convened; this time to discuss J.C.'s placement. During the meeting, which was held approximately three (3) months into J.C.'s 6th

grade year, Mary Coleman again discussed the STEP program with the IEP team and recommended that J.C. be placed in the program. After a lengthy discussion the IEP team members, who included J.C.'s parents, agreed to place J.C. in the STEP program.

6. A behavior plan is produced for each student in the STEP program. On November 15, 2005, the IEP team, including J.C.'s parents, re-convened and agreed upon J.C.'s behavior program and behavior goals for the STEP program. The IEP team also discussed the expectations from J.C.'s participation in the program.

7. There were less than ten (10) other students in the STEP program when J.C. attended. J.C. left the STEP program at the end of the 7th grade.

8. Mary Coleman noticed an improvement in J.C.'s behaviors in the 8th grade. Ms. Coleman noted that one indicator that J.C. had progressed in the 8th grade was that he was able to progress to a high school setting and function in his least restrictive environment, which was one of his goals.

9. The goal of SCS in regard to special education students with behavioral issues is to address their behavior problems and measure progression by the frequency of their behavior.

10. Ernest Lee Hickman, Jr., a teacher certified in special education, K through 6th, worked with J.C. in the STEP program. Mr. Hickman testified that "the behavior never goes away, it's like in remission."

11. On each IEP there is a signature page on which members of the IEP team must indicate their agreement or disagreement with the IEP. Additionally, on the same signature page, there is a section requiring the parents or guardians to indicate whether they have, "been informed and understand my rights as a parent, and have received a copy of my rights"; have, "been involved

in the IEP team meeting and/or the development of this IEP, and give permission for the proposed program described in this IEP for my child.”

12. J.C.’s parents were involved in, approved and signed each of his IEPs while J.C. was enrolled in SCS. They never filed a due process request in SCS.

13. Working to change J.C.’s behavior was on-going. The IEP team continuously looked at the functional behaviors to see what they could institute to help with his behavior. Some behaviors decreased. They kept revising his educational program. **The SCS staff did not see great, giant steps, however they continually saw progress being made with J.C.** They saw a **decrease in the frequency and duration** of certain behaviors.

14. The measure for behavioral progress for someone with Asperger’s is not the same measure that would be used to measure the behavioral progress of someone who does not have Asperger’s.

15. The April 29, 2008 IEP, which was signed by J.C.’s mother, reflected that on the ThinkLink examination J.C. scored advanced in problem-solving, geometry and graphs, proficient in algebra, data/probability and measure and nonproficient in number/operations; he scored advanced in meaning, tech and skills, vocabulary, writing organization and writing process and proficient in content and grammar; and he also scored advanced in environment adaptation, earth features, earth resources and force, and proficient in heredity and matter.

16. J.C.’s parents had on-line access via a program called PowerSchool, to J.C.’s grades, missing assignments, day-to-day updates and information concerning where J.C. stood academically.

17. **SCS complied with all procedures set forth in the Act:**

(a) J.C.'s IEPs and behavior plans were all prepared with the active input of his parents and their suggestions were incorporated into those plans. J.C.'s parents were presented their rights during each IEP meeting and were given the opportunity to object to each IEP, however, they AGREED to each and every IEP and behavior plan.

(b) J.C.'s parents were provided constant access to J.C.'s teachers and administrators. They never told any SCS teacher, administrator, or any representative that they believed that SCS was violating the IDEA, J.C.'s IEPs, or behavior plans.

(c) J.C.'s parents had a constant access to J.C.'s grades and assessments and listings of J.C.'s schedule.

(d) J.C.'s IEPs included all that is required to be included in an IEP by the IDEA and more.

(e) Each of J.C.'s IEPs and behavior plans were carefully and thoughtfully crafted to address each of J.C.'s needs. Modifications were frequently made to address changes in J.C.'s needs and the requests of his parents. The IEP minutes and the IEPs, both of which were signed in agreement by J.C.'s parents, reference individualized accommodations that were provided to meet J.C.'s individual needs.

(f) SCS provided J.C. a free, appropriate, public education that was meeting his educational and behaviorial needs and providing him with educational services in the least restrictive environment, which included mainstream classes when possible, small group settings, and interaction with regular education population virtually every day.

(g) J.C. was provided psychoeducational counseling, DBT, and experiential therapy, Skills Streaming, the STEP behavior program and the high school behavior program to specifically and individually address his individual behavior issues.

18. Dr. Browning and Mary Coleman continued to provide support to J.C. during high school. J.C. also had an additional school psychologist at his disposal at Collierville High School.

19. During J.C.'s 9th and 10th grade years, Ms. Hancock sent J.C.'s parents communications on a regular basis about what was happening during J.C.'s school day.

20. J.C. had a friend at Collierville High School, which is a sign of progress in terms of social skills.

21. By the 10th grade, Mary Coleman noticed improvement in the way J.C. responded to adult directives from when he was in the 6th grade.

22. When J.C.'s parents withdrew him from Collierville High School in the 10th grade, he was making a 93 in language skills; he was making an 80 in a regular education biology class; he was making a 93 in a regular education keyboarding class; and he was making an 88 in math class.

23. When J.C. left SCS, his ThinkLink scores reflected that he was proficient and advanced in most testing areas. J.C.'s academic grades and standardized tests reflect that he was making educational progress while enrolled in SCS. Students with Asperger's Syndrome learn in spite of their behaviors.

CONCLUSIONS OF LAW

1. The Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02.

2. The parents bear the burden of proving by a preponderance of the evidence that the IEP is inappropriate. *Schaffer v. Weast*, 126 S.Ct. 528 (2005); *Kings Local School District v. Zelazny*,

325 F.3d 724 (6th Cir. 724, 2003). The United States Supreme Court has held that an IEP comports with the standards of the IDEA if it is reasonably calculated to enable the child to receive some educational benefits. *Board of Educ. v. Rowley*, 458 U.S. 200 (1982).

3. The burden is on the Plaintiffs in this case to prove that SCS did not provide a free, appropriate, public education for J.C., and that Discovery Ranch is an appropriate placement for J.C.

4. The 6th Circuit has held that parents are only entitled to reimbursement for private placement if: "a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act." *Berger v. Medina City School District*, 348 F.3d 513 (6th Cir. 2003).

5. In determining whether the public placement violated the IDEA, the reviewing court must undertake a twofold inquiry: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Berger @* 520.

6. The 6th Circuit has held that:

"A procedural violation of the IDEA is not a *per se* denial of FAPE. Rather a procedural violation will constitute a denial of a FAPE only if it causes substantive harm to the child or his parents; such as seriously infringing on the parents' opportunity to participate in the IEP process, depriving an eligible student of an IEP, or causing the loss of educational opportunity."

Berger @ 520.

7. The evidence presented at the hearing shows that SCS followed IDEA procedures and implemented and complied with IEPs designed to provide J.C. with an educational benefit.

ANALYSIS

The evidence shows that J.C.'s parents were actively involved in planning J.C.'s IEPs, and that they approved and signed the IEPs that were prepared for J.C. The IEP requires that specific services be identified to achieve the student's stated goals in the IEP.

J.C.'s parents are clearly very active and supportive in helping him reach goals. They love him and care deeply about his academic and behavioral progress. **Unfortunately, there is no cure for Asperger's Syndrome.** Also, there is no guarantee that someone with a disability with behavior problems is not going to have the same behavior problems again. Although J.C. continued to make progress while enrolled in SCS, he still had behavioral problems, just as he does after eight (8) months of residential treatment at Discovery Ranch.

Recently, on **May 10 and May 11, 2010**, J.C. had to be physically restrained because he was out of control at Discovery Ranch. After eight (8) months at Discovery Ranch, the proof shows that J.C.'s behavioral problems have not been remedied. On **April 13, 2010**, J.C. was physically aggressive with a peer. As late as **April 20, 2010**, the record indicates that J.C. has been disrespectful to staff. He has missed group and individual therapies many times due to being on IS (In-school Suspension) or Introspective Separation, in which he is placed away from his peers.

Anne Thompson, an educational consultant and certified educational planner, made the recommendation to place J.C. at Discovery Ranch. Ms. Thompson has a Bachelor's and a Master's degree in speech pathology. Ms. Thompson had no knowledge of how many hours J.C. spends in the classroom at Discovery Ranch. When Ms. Thompson looked into Discovery Ranch as a possible placement for J.C., she did not check the credentials of the principal there, nor did she check the credentials of any of the teachers there.

Ms. Thompson had no knowledge about how a student with Asperger's Syndrome, whom she also referred to the Discovery Ranch, progressed through the program at Discovery Ranch. When Ms. Thompson talked to Craig Smith, the Clinical Director at Discovery Ranch, Mr. Smith did not give her any specific information about the progress of another student at Discovery Ranch with Asperger's Syndrome. Ms. Thompson has never met J.C.

Dr. Brinley, a child and adolescent psychiatrist, only met J.C. after he arrived at Discovery Ranch. Dr. Brinley's focus during his visits with J.C. has been "the medication aspect of it."

When Dr. Brinley prepared his psychiatric evaluation of J.C., it was within a week of when J.C. arrived at Discovery Ranch. In the evaluation, Dr. Brinley relied upon what J.C. told him and what was contained in his chart; although the chart did not include the psychiatric evaluation, history or treatment session notes of J.C.'s treating psychiatrist, Dr. Robert Hoehn.

Dr. Brinley is not on J.C.'s treatment team at Discovery Ranch. He has never been to Shelby County Schools and he has never seen J.C. in the academic setting at Discovery Ranch. Dr. Brinley has never reviewed J.C.'s treating psychiatrist, Dr. Hoehn's, treatment session notes or evaluation of J.C., nor has he ever spoken with Dr. Hoehn about J.C.

The Clinical Director at Discovery Ranch, Craig Smith, is responsible for overseeing the individual, family and group therapy and developing new programming. Mr. Smith is not a psychologist or a psychiatrist. Mr. Smith has a Master's degree in Social Work, but has no degree in education, no academic training in special education, and has had no formal training in the area of Asperger's, other than curriculum he received in the social work graduate program, and approximately five (5) training sessions that have lasted between two hours and half a day, over the last five years.

The treatment team at Discovery Ranch is comprised of therapists, the director of academics, a nurse, some of the line staff and the supervisors and coordinators of the residential staff. **None of J.C.'s teachers are on the treatment team, nor is his treating psychiatrist, Dr. Brinley.**

The residential staff at Discovery Ranch do not have degrees in special education. Matt Child is J.C.'s assigned "therapist" at Discovery Ranch. Mr. Child is a social worker. Other than what information he received during his social work graduate program, Mr. Child's only training regarding Asperger's has been three one hour seminars. Mr. Child does not have any special education certifications. Matt Child has no residents with Asperger's in his therapy group other than J.C.

The Director of Academics for Discovery Ranch is Victoria Fielding. Ms. Fielding has a Bachelor of Arts degree in Secondary Education. Ms. Fielding's responsibilities at Discovery Ranch are administrative. She does not teach classes at Discovery Ranch. **Ms. Fielding has no training in and is not certified in special education.**

Students at Discovery Ranch receive academic credit for caring for their cows, going to P.E., going to group therapy such as "alcohol and drug" therapy, equine therapy, and individual therapy with their therapists. These courses are all offered in the morning hours. J.C. receives his academic instruction at Discovery Ranch in the evenings.

According to Ms. Fielding, J.C. is often unable to be in a classroom due to his behavior, thus a tutor is assigned to work with him in the residence. Ms. Fielding testified that because of J.C.'s Asperger's, you can't put him in a classroom and expect him to do what all the other kids do and be quiet and behave. J.C. has had one classroom teacher and three tutors since he arrived at Discovery Ranch. **The classroom teacher does not have a certification in special**

education. A special education teacher comes to Discovery Ranch on Thursday nights to work with teachers, but he does not teach.

J.C.'s parents are permitted to speak with him for only one hour per week as part of family therapy. His parents do not get a daily or weekly log from Discovery Ranch informing them about J.C. Insurance coverage for J.C.'s stay at Discovery Ranch has been denied because residential treatment is not deemed to be medically necessary.

SCS provided J.C. highly qualified teachers, administrators, psychologists, a behaviorist with expertise in special education and a student response team.

Karen Jackson has a Bachelor's degree in Special Education and a Master's degree in Education, Administration and Supervision. Ms. Jackson has been working in the field of special education for 29 years. Ms. Jackson testified that SCS not only provided J.C. with a free, appropriate, public education, but that they provided J.C. with the **"Cadillac of appropriate education."**

Ms. Jackson stated that her administrative notes targeted the disruptions J.C. had while at Schilling Farms Middle School, but they did not reflect the good times J.C. had such as being top salesman in the school for the fundraiser, participating in the year end party, participating in the limo ride, and working with the functional skills students which showed his sense of responsibility and leadership.

Ms. Jackson's administrator notes reflect that 91% of the 180 days J.C. attended school at Schilling Farms Middle were productive. J.C.'s episodes of disruption lasted for only a very short period of time, and he would work himself through and come back to what he was supposed to be doing.

Ms. Jackson testified that based upon her years of experience in special education, there is no program that teaches life skills better than Shelby County Schools. "Shelby County did the best there is to do to work with and address the needs of that particular individual child (J.C.)."

Based upon her years of working with special education students and J.C., Ms. Jackson believes that J.C. does not need to be placed in a residential setting because he needs to learn to function in society, and that SCS was teaching him to do that. Ms. Jackson believes that J.C. needs the interaction with his peers, his home, his family and his church, and that removing him from society is a setback.

Elizabeth Schermerhorn, assistant principal at Collierville High School, has a Bachelor's degree in learning disabilities and a Master's degree in educational leadership. It is Ms. Schermerhorn's opinion that the behavior program developed for J.C. and two other students at Collierville High School provides help to the student day-by-day, minute-by-minute in navigating the challenge for a child with behavior issues to navigate the school building, navigate the world and navigate life.

The SCS staff who worked with J.C. did everything they could to meet his needs. J.C.'s parents never told Kristi Hancock that they believed that Shelby County Schools was violating the Individuals with Disabilities in Education Act. J.C.'s parents never told Beth Schermerhorn, either in her capacity as Special Education Specialist for J.C. or in her role as J.C.'s Assistant High School Principal, that they did not believe that J.C.'s IEPs were not being followed.

Marty Redding is SCS's Executive Director of the Department of Exceptional Children. Ms. Redding has been an educator for 35 years and has a Master's degree in Special Education and has completed the course work needed for her Doctorate. Ms. Redding has taught special education students, has been a Principal, Assistant Principal and has been a supervisor.

J.C.'s parents never reported to Ms. Redding in her capacity as the Executive Director of the Department of Exceptional Children that they did not feel that SCS was not providing J.C. a free, appropriate, public education.

Dr. Terry Browning worked with J.C. in the STEP program. Dr. Browning is a school psychologist, a licensed psychological examiner, a member of SCS's Student Response Team, a member of SCS's REACH team, an adjunct teacher, a licensed marriage and family therapist, a licensed senior psychological examiner, an officer of the Tennessee Association of Marriage and Family Therapists, a former officer of the Tennessee Association of Psychological Examiners and a former Board Member of the Brain Injury Association of Tennessee. Dr. Browning is a frequent presenter of topics in his fields of expertise.

Dr. Browning conducted psychoeducational counseling with J.C. at least weekly. With the psychoeducational counseling, Dr. Browning would look with J.C. at, "what's happening in the classroom, what's happening in a particular event, how are you (J.C.) looking at it, the thinking errors similar to DBT, and experiential areas, and where are you (J.C.) going to go from here? What's the best approach? How can we learn from it."

Dr. Browning worked at Youth Villages, a residential treatment facility in Memphis, Tennessee as a Residential Counselor prior to working for SCS. Based upon his experience working in a residential treatment facility and based upon his experience working with J.C., he does not believe that a residential treatment facility is an appropriate placement for J.C. because J.C.'s needs and progress were being addressed in SCS.

Dr. Browning opined that J.C.'s behaviors would improve more had he not moved to Discovery Ranch, because while he was attending SCS he was in a more realistic setting with peers that are a heterogeneous group, as opposed to Discovery Ranch, in which he is just with

peers that are in a treatment setting. **Dr. Browning believes that feeling homesick by January is an indication that J.C. is still not adjusting to the setting at Discovery Ranch.**

Another reason Dr. Browning does not believe that Discovery Ranch is providing J.C. the support he needs is that it does not have an appropriate treatment plan for J.C. Dr. Browning agrees with Dr. Hoehn that an appropriate and effective treatment plan must address specific strategies about how goals will be addressed. **The treatment plan Discovery Ranch prepared for J.C. does not include strategies of how J.C.'s goals will be addressed.**

Kristi Hancock was J.C.'s special education teacher at Collierville High School. Ms. Hancock has a Bachelor's degree in special education. Prior to coming to work for SCS, Kristi Hancock worked at Youth Villages, a residential treatment facility in Memphis, Tennessee as a Principal, special education teacher and teacher evaluator. Based upon her experience working in a residential treatment facility and based upon her experience working with J.C., Ms. Hancock does not believe that a residential treatment facility is appropriate for J.C. Ms. Hancock has worked with children and young adults with Asperger's.

Robert Hoehn, M.D., J.C.'s psychiatrist, admitted that he could not testify that J.C. did not receive a free, appropriate, public education when he attended SCS. It is Dr. Hoehn's opinion that all teenagers are in the process of maturing while they're in high school, and that if J.C. had been in Collierville High School, he would have had the opportunity to mature. Dr. Hoehn has no knowledge of what medications J.C. has been taking during his stay at Discovery Ranch.

Based on her 26 years of working with special education students, Beth Schermerhorn does not believe that the residential setting is appropriate for J.C. Ms. Schermerhorn believes

that at Discovery Ranch J.C. may learn to live at Discovery Ranch, but he is not learning the skills necessary to live in his own natural setting, where his family and community live.

Further, Ms. Schermerhorn believes that taking J.C. out of his natural setting and placing him at Discovery Ranch is like placing him in a room by himself and teaching him the skills for good behavior, but never applying them anywhere else.

The resolution of this matter turns on a factual determination of whether J.C. made progress while he was enrolled in SCS and whether the school district provided a free, appropriate, public education for J.C.

The evidence presented at the hearing shows that SCS followed IDEA procedures and implemented IEPs designed to provide J.C. with an educational benefit. It is clear that J.C. made progress, both academically and behaviorally, while enrolled in SCS.

It is determined that SCS provided the necessary services to deal with J.C.'s behavior, as was required in J.C.'s IEPs. J.C.'s parents approved all of his behavior plans in the 8th, 9th and 10th grades. J.C.'s parents approved and signed each IEP. **SCS complied with J.C.'s IEPs.**

It is therefore **ORDERED** that Shelby County Schools **provided** J.C. with a free, appropriate, public education; Shelby County Schools did not violate the IDEA; Shelby County Schools did comply with the procedures of the ACT; J.C.'s IEPs were reasonably calculated to enable him to receive some educational benefit; Discovery Ranch is not an appropriate placement for J.C.; and Petitioners are not entitled to the relief sought or to any relief. Shelby County Schools is the prevailing party in this matter.

This Order entered and effective this 29th day of July, 2010.



Joyce Carter-Ball
Administrative Law Judge
Administrative Procedures Division

Notice

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee or the Chancery Court in the county in which the petitioner resides or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of a Final Order. In appropriate cases, the reviewing court may order that this Final Order be stayed pending further hearing in the cause.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court, under provisions of Section 49-10-601 of the Tennessee Code Annotated.